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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HOWARD FUCHS, Plaintiff and Respondent, v. JOEL WERTMAN, Defendant and Appellant.	B283114 (Los Angeles County Super. Ct. No. BS162644)

APPEAL from an order of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Law Offices of Al Lustgarten, Alfred Lustgarten; Law Offices of Lawrence P. House and Lawrence P. House for Defendant and Appellant.

Gregory B. Byberg for Plaintiff and Respondent.

On May 19, 2014, Howard Fuchs (Fuchs) obtained a default judgment in the Supreme Court of New York in the amount of $1,917,336.23 against Joel Wertman (Wertman) and Mustard Pancakes, Inc. (Mustard) (collectively defendants). On June 8, 2016, Fuchs applied for entry of judgment against Mustard and Wertman on the sister state judgment in the Los Angeles County Superior Court. On August 29, 2016, Fuchs filed an amended application for entry of judgment. That same day, the clerk for the Los Angeles County Superior Court entered judgment against defendants. Defendants moved to vacate and stay enforcement of the judgment on the grounds that the Supreme Court of New York lacked personal jurisdiction over them and thus the sister state judgment could not support a judgment in California. The trial court denied the motion on April 14, 2017 and Wertman appealed. For the reasons set forth below, we affirm.

DISCUSSION

The only issue raised in the lower court and on appeal was whether New York had personal jurisdiction over defendants. At oral argument, Wertman conceded that New York had proper jurisdiction over defendants and instead argued that Wertman was not liable under the terms of the agreement. Despite Wertman's representation to the contrary, Wertman contested liability for the first time on appeal. In fact, defendants expressly waived liability in the trial court, stating in their reply memorandum in support of the motion to vacate the sister state judgment that "the merits of the underlying Judgment (or whether it was supported by evidence) is not the issue before this court. . . . [¶] Accordingly, this court should not address the issue of the merits of the underlying action, and should resolve this matter on the question of whether the evidence presented is

sufficient to establish that New York had jurisdiction over . . . Wertman."[1] (Fn. omitted.) Because the only dispute considered by the trial court was whether New York had personal jurisdiction over defendants, Wertman's concession of that issue is fatal to the appeal before us. "It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal." (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.)

Wertman's concession notwithstanding, there is still ample evidence in the record to affirm the trial court's order. Defendants received the loaned funds from New York and hired a New York accountant in connection with the loan at issue. Further, defendants consented to New York jurisdiction in both the loan agreement and promissory note which contained valid forum selection clauses subjecting them to New York jurisdiction in the event they defaulted on the loan. It is the policy of New York courts to "enforce contractual provisions for choice of law and selection of a forum for litigation." (*Koob v. IDS Fin. Servs.* (1995) 629 N.Y.S.2d 426, 433; *Boss v. Am. Express Fin. Advisors, Inc.* (2005) 791 N.Y.S.2d 12, 14.) A party opposing enforcement of a valid forum selection clause must show "exceptional facts" explaining why he should not be bound by his contractual duty. (*Weiss v. Columbia Pictures Television, Inc.* (S.D.N.Y. 1992) 801 F.Supp. 1276, 1278.) Wertman has not made such a showing here.

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[1] This statement appears under the heading: "THE MERITS OF THE UNDERLYING CLAIM ARE NOT AT ISSUE."

DISPOSITION

The order is affirmed. Howard Fuchs is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.